

SERVICE DATE - APRIL 4, 2003

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. 42057

PUBLIC SERVICE COMPANY OF COLORADO D/B/A XCEL ENERGY
v.
THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY

Decided: April 3, 2003

In this case, the Public Service Company of Colorado d/b/a Xcel Energy (Xcel) challenges the reasonableness of rates charged by The Burlington Northern and Santa Fe Railway Company (BNSF) for movements of coal from origins in the Powder River Basin of Wyoming to Xcel's Pawnee Steam Electric Generating Station near Brush, CO. It bases its challenge on the stand-alone cost (SAC) test, under which Xcel seeks to show that the rates exceed what a hypothetical stand-alone railroad (SARR) would need to charge to serve the complainant's traffic.¹

On January 10, 2003, Xcel filed its opening evidence. BNSF's reply evidence is due on April 4, 2003, and Xcel may file rebuttal evidence on May 19, 2003. On February 6, 2003, BNSF filed a motion for summary disposition on the grounds that Xcel failed to present a prima facie case in its opening evidence. BNSF also seeks a stay of the procedural schedule. Xcel filed its reply on February 26, 2003. For the reasons discussed below, we will deny BNSF's motion.

DISCUSSION AND CONCLUSIONS

BNSF argues that the hypothetical SARR presented in Xcel's opening evidence would have insufficient capacity, too few trains, too few sidings, too few crew starts, trains traveling too fast, trains colliding, and cycle times that are too short. BNSF claims that, in light of these shortcomings, Xcel failed to present competent evidence on the operating costs and capacity requirements of the hypothetical SARR. BNSF argues that, absent such evidence, Xcel has failed to make a prima facie case of a hypothetical SARR capable of serving in a feasible manner the traffic group selected by Xcel.

In response, Xcel disputes many of BNSF's specific allegations. Xcel acknowledges some of those flaws in its reply (too few sidings, too few crew starts, and a few trains traveling

¹ Our general standards for judging the reasonableness of rail freight rates are set forth in Coal Rate Guidelines, Nationwide, 1 I.C.C.2d 520 (1985), aff'd sub nom. Consolidated Rail Corp. v. United States, 812 F.2d 1444 (3d Cir. 1987).

too fast), but it claims that these can be easily remedied. Xcel asserts that correction of these errors would not alter its basic case, because the challenged rate would still be shown to be unreasonable under the SAC test.

We are increasingly troubled by the submission of incomplete or erroneous evidence on opening in a SAC case and a complainant's reliance upon an opportunity to address deficiencies through later evidentiary submissions, to which the defendant has no opportunity to respond. The interests of fairness and orderly handling of a case dictate that parties submit their best evidence on opening, so that each party has a fair opportunity to reply to the other's evidence. Moreover, later changes to the complainant's case-in-chief complicate our review of the evidence and impede our efforts to handle these cases in an orderly and timely manner. Thus, it is important that parties make their case-in-chief in their opening evidence. See General Procedures for Presenting Evidence in Stand-Alone Cost Rate Cases, STB Ex Parte No. 347 (Sub-No. 3), slip op. at 5 (STB served Mar. 12, 2001); Duke Energy Corp. v. CSX Transp., Inc., STB Docket No. 42070 (STB served Mar. 25, 2003).

Here, Xcel disputes some of the alleged deficiencies and those allegations are better left for an assessment on the merits after development of the full evidentiary record. Xcel concedes that its opening evidence contains errors, but those deficiencies appear to be readily correctable without a significant redesign of the SARR. BNSF has not demonstrated that the alleged errors in Xcel's opening evidence are so large in magnitude or so egregious as to warrant dismissing the complaint at this early stage of the proceeding.²

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. BNSF's motion for summary disposition and stay of the procedural schedule is denied.

² See McCarty Farms v. Burlington N., Inc., ICC Docket No. 37809, slip op. at 8 (ICC served Feb. 13, 1995) ("Unless the model is patently incapable of meeting the shipper's needs, we will presume that the stand-alone system is feasible unless and until its feasibility is challenged in the railroad's case-in-chief.").

2. This decision is effective on the date of service.

By the Board, Chairman Nober and Commissioner Morgan.

Vernon A. Williams
Secretary